



LEGAL ISSUES IN THE METAVERSE

PART 1: THE CONSUMER

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THE METAVERSE:



WHY THE FUSS?

The Metaverse has seized the attention of global brands and big technology companies. Some brand owners have applied to register trade marks over downloadable virtual goods, for example Nike and Abercrombie & Fitch. Some corporates have filed patent applications, for example Disney has obtained a patent in the US for a virtual world simulator. From an M&A and funding perspective, the Metaverse has attracted much attention too. For instance, in January 2022, Microsoft announced its planned multi-billion dollar acquisition of video game giant Activision Blizzard. This strategic acquisition is part of the technology company's plans to expand its Metaverse offerings.

Businesses that wish to expand into the Metaverse will need to be mindful of some legal issues. We have compiled a series, "Legal issues in the Metaverse", in which we will unpack some of the legal considerations surrounding the Metaverse. In this edition, we are focusing on the Metaverse user (consumer). We have outlined some use cases and terminology frequently used in the context of the Metaverse, and given some insights into consumer protection and liability issues which are likely to be prevalent in the Metaverse. Many of these legal issues are not new, as they are still being debated in relation to the internet and social media.



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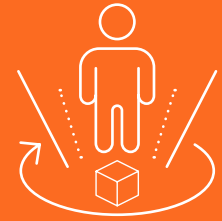
KEY TERMS

Metaverse vs Web 3.0. These terms are erroneously used interchangeably. The definition of the **Metaverse** is not yet entirely concrete, due to its evolving nature. In its current form, it is a simulated digital environment or platform which mixes the "real" world with a "virtual" one, enabling a real time, virtual experience. The Metaverse is not a game, but gaming is one use case for the Metaverse (see use cases below). **Web 3.0** is a new version of the internet which enables users to own and control the assets and content they create. It is therefore referred to as being a decentralised internet, meaning that the underlying technologies are not centralised on servers owned by individuals or organisations.

NFTs (Non-Fungible Tokens). Built using the same type of programming as cryptocurrency (blockchain), NFTs are distinguishable and unique, and cannot be exchanged for something identical (hence, non-fungible). When you create (i.e. "mint") or purchase an NFT, you are minting or purchasing a digital asset with a unique digital identity. NFTs are essential for the Metaverse to function optimally.

Avatars. An on-screen representation of a user which is created by or on behalf of the user, and which becomes his or her "virtual presence" in the Metaverse. A user can move his or her avatar in the Metaverse using technologies such as key controls and full-body sensor recognition to conduct activities such as walking, jumping etc.

03



USE CASES

What are some of the use cases for the Metaverse?

Some of these use cases already exist, such as virtual gaming applications. Others exist in a slightly different form, such as virtual meeting spaces.



EXPLORATION

Example: Virtual tourism - imagine visiting the Great Wall of China from your home in Spain.



WORKING

Example: Corporate events - colleagues and customers in multiple locations can meet and interact in a virtual space.



SHOPPING

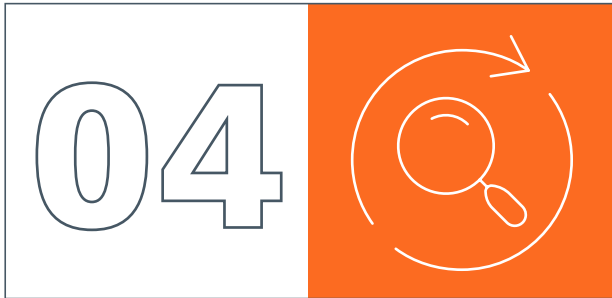
Example: Commerce – you can purchase clothing from a virtual mall for your avatar to wear while in the Metaverse.



INVESTING

Example: Real Estate – you can own a virtual mall and lease out space to virtual tenants.

And the list goes on



SEEING THE METAVERSE THROUGH THE CONSUMER LENS

PRODUCT LIABILITY

Consumer protection laws create rules for a fair and just marketplace and provide consumers with rights in relation to the products and services they consume. In South Africa, the Consumer Protection Act, 2008 (CPA) provides a consumer with the right to safe, good-quality goods, and an implied warranty of quality. While these rights are easily understood in the context of a physical item, such as a virtual reality headset purchased to access the Metaverse, how do they apply to intangible goods such as virtual real estate in the Metaverse? The definition of "goods" in the CPA is wide. It includes data, software, code or other intangible products which are written or encoded on any medium. This definition sufficiently extends the application of the CPA to the Metaverse. However, a more vexing question is where does liability lie? With the creators of the Metaverse, third-party software developers, the brand selling the goods or a third-party Metaverse user?

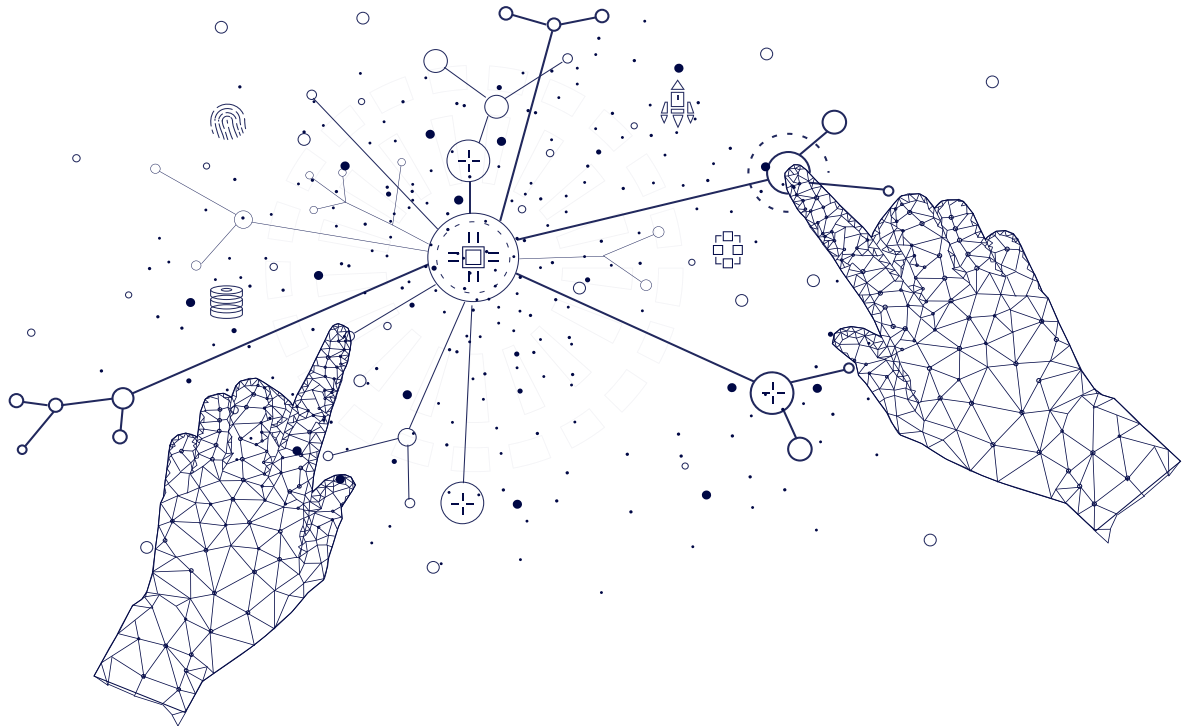
Businesses that offer goods and services in the Metaverse should be mindful of the consumer's rights under the CPA. They should also consider how to mitigate against any liability claims which may be made against them, including by contractually limiting their liability (where possible and lawful), taking out adequate insurance policies etc.

DATA PROTECTION

The Metaverse poses some interesting questions about how and why personal information is used, and what constitutes personal information. While the definition of personal information in most data protection laws includes typical identifiers such as a person's name, phone number, identity number, and email address, in the Metaverse personal information can become much more granular and inferential. For instance, facial expressions, eye movement, and avatar movements such as hand gestures may all be construed as personal information if they identify a person. Lawmakers may need to re-visit the definition of personal information in their respective jurisdictions to cater for these nuances.

Data protection laws are fairly prescriptive regarding the transfer of personal information to foreign jurisdictions. These laws typically provide that personal information may not be transferred to a third party in a foreign country unless certain requirements are met. The Metaverse, by nature, transcends geographical borders. Unless the Metaverse is created using privacy-by-design principles, it may prove to be impossible to comply with the data protection laws that exist in each jurisdiction.

Due to the data-driven nature of the Metaverse, any business operating in this space will need to embed data protection into their offering, including, amongst other things, by having robust data protection policies, systems that are designed to ensure that personal information is secure, and well-drafted contracts with stakeholders who process the Metaverse consumers' personal information.



CYBERSECURITY

Cyberbullying, sexual harassment and other types of cybercrimes are ubiquitous on online platforms. There are endless opportunities for cyber criminals to operate in the Metaverse, due to the nature of NFTs, which are reliant on blockchain technology. Cybercriminals are attracted to the anonymity of the blockchain and the fact that it is relatively unregulated.

The recently-enacted Cybercrimes Act, 2020, which is partially operational, criminalises various forms of cybercrime and malicious communication. Cybercrimes such as hacking, ransomware, cyber fraud, social engineering, and others may be prosecuted under this Act. Malicious communications include unlawfully disclosing an intimate picture of someone else without their permission. Importantly, the Act caters for a situation where that intimate picture is simulated, not real. The use of the term "simulated" is a welcoming nod in the direction of the Metaverse as it acknowledges that revenge porn may take on a different dimension in the Metaverse through the use of avatars, artificial intelligence, and virtual reality.

Metaverse users will need to pay careful attention to how they secure their avatars and digital assets in the Metaverse. Businesses with Metaverse offerings should be mindful of the legal implications of a cyber-attack, including the reporting obligations, preservation of evidence requirements etc.

PERSONALITY RIGHTS

Metaverse users may be tempted to create avatars that resemble their favourite celebrities, influencers or other third parties. However, users would be well advised to proceed with caution, so as not to infringe the personality rights of these persons. Personality rights are well recognised, and in South Africa these rights are firmly entrenched in the Constitution. These rights will apply in the Metaverse, in the same manner that they have been applied in the realm of the internet and social media. One of these personality rights is the right to identity, in terms of which one person cannot appropriate the name or likeness (i.e. physical image) of another for commercial advantage. If your avatar looks like a famous actor, and you use your avatar to advertise your products in the Metaverse, you may find that your avatar constitutes an unlawful infringement of the actor's identity.

Celebrities, politicians, social media influencers, professional sportsmen and other well-known public figures should obtain legal advice about whether they can protect their personality rights – in some instances, they may be able to register a trade mark to protect their personal brand.

In our next edition of this series, "**Legal issues in the Metaverse**", we will unpack the legal considerations for businesses wishing to commercialise opportunities in the Metaverse.



Leanne Mostert

Partner at Webber Wentzel

For enquiries on the legal issues in the Metaverse contact Leanne Mostert [here](#)

Cape Town

15th Floor, Convention Tower
Heerengracht, Foreshore,
Cape Town
8001
+27 21 431 7000

Johannesburg

90 Rivonia Road,
Sandton
Johannesburg
2196
+27 11 530 5000

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